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No. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner

v.

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,
Respondents

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF FOR THE NATIONAL COMMITTEE FOR ADOPTION, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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ENTRY OF APPEARANCE

The undersigned hereby enters his appearance as counsel of record for The National Committee for Adoption, Inc., Amicus Curiae.

Dated this 22nd day of March, 1983.

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INTEREST OF AMICUS CURIAE

The National Committee for Adoption, Inc. ("NCFA") is a national, voluntary, non-profit charitable corporation organized to promote sound adoption policies and practices. NCFA is comprised of individual members and private not-for-profit licensed adoption agencies providing services in 39 states and the District of Columbia. Individual members include adoptive parents, adopted men and women, biological parents of adopted children, and interested professionals. NCFA sponsors conferences on adoption issues and follows the development of state and federal laws affecting adoption. NCFA is especially concerned about legal developments—legislative and judicial—that affect the timing and security of infant adoptive placements.

NCFA has a special interest in the issues presented in this case. Depending on how broadly those issues are resolved, the decision may seriously affect the ability of NCFA members to assist unwed teenage mothers attempting to extricate themselves from the adverse consequences of imprudent sexual behavior.

NCFA is particularly concerned because neither the mother involved in this litigation nor the child have to date participated through legal counsel in appellate proceedings, including proceedings before this Court.

NCFA member agencies have had extensive experience working with unwed parents, male and female. NCFA agencies are aware that the rules defining the procedural and substantive rights of unwed parents will have tremendous significance in determining whether biological parents will consider adoption as an option to abortion or to raising unplanned children. NCFA believes that its insights, gained through the collective experience of its members, will be helpful to the Court in its effort to balance and protect the respective rights of out-of-wedlock children and their biological parents.

Counsel of record for all parties have given written consent to the filing of this Amicus Curiae Brief in support of Respondents (pp. A-1-A-3, *infra*).

PARTIES

Petitioner: Donald J. Kirkpatrick, biological father of the child Baby Girl S., a child born out-of-wedlock.

Respondents: Christian Homes of Abilene, Inc., the agency to whom the child's mother relinquished her parental rights as a prerequisite to adoptive placement, and the 326th District Court of Taylor County, Texas, the trial court which rendered the judgment attacked in this proceeding.

Other persons interested and parties in the trial court and apparently unrepresented before the Court in these proceedings either by attorney of their choice or by appointed counsel: R.L.S., the child's mother, who has requested to remain anonymous, and Baby Girl S., the child.

STATEMENT OF THE CASE

About April, 1980, Petitioner Don Kirkpatrick, then age 23, impregnated R.L.S., then age 15, in Nebraska.[1] His relationship with R.L.S. began while R.L.S. was a 14-year-old eighth grader (J.A. at 172a) and he was 22. By having sexual relations with R.L.S., Kirkpatrick committed the felony of sexual assault in the first degree.[2]

R.L.S. worried about getting pregnant but was unwilling to discontinue sexual relations with Kirkpatrick (J.A.

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[1] Baby Girl S. was born on January 11, 1981 (J.A. at 27a). Conception occurred about April, 1980. Kirkpatrick was born April 8, 1956 (J.A. at 389a). R.L.S. was born October 1, 1964 (J.A. at 118a).

[2] From the record, it cannot be determined whether R.L.S. was 14 or 15 years of age when intercourse began. NEB. REV. STAT. §28-319 (1979) states that any person subjecting another person to sexual penetration is guilty of sexual assault in the first degree if the actor is nineteen years of age or older and the victim is less than sixteen years of age. Consent by the victim is no defense.

at 120a). After learning of the pregnancy, Kirkpatrick offered marriage (J.A. at 157a). R.L.S. refused, established residence at Christian Homes of Abilene (the "agency") and made plans to release the child for adoption. Kirkpatrick and R.L.S. never lived together, never married, never attempted to marry, and never established a family relationship, formal or informal.

Throughout the pregnancy, Kirkpatrick expressed a desire to marry R.L.S. and raise the child (J.A. at 137a). He agreed, however, not to block adoption of the child if R.L.S. chose that option (J.A. at 289a, 324-325a). After the child's birth on January 11, 1981, in Abilene, Texas, Kirkpatrick told agency representative Nancy Miller that he would sign papers releasing his rights with respect to the child and requested that she send the papers to him (J.A. at 27a, 206a, 344a). On January 15, 1981, the agency filed this suit (J.A. at 1a, 5a-11a). Believing that Kirkpatrick would keep his word, R.L.S. relinquished her parental rights the following day (J.A. at 12a-17a, 163a-165a). Kirkpatrick was given notice and, on January 29, he signed a statement of paternity (J.A. at 27a-29a). On February 3, he counterclaimed to establish the parent-child relationship by voluntary legitimation (J.A. at 1a, 38a) pursuant to TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83).

Voluntary legitimation in Texas is automatic if the biological parents marry or attempt to marry, either ceremonially or informally, after conception.[3] Texas courts must legitimate a child if the biological parents with or without marrying jointly seek legitimation.[4] If the mother seeks child support from the biological father, she implicitly consents to legitimation by requesting establishment of the parent-child relationship by proof of pater-

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[3] TEX. FAM. CODE ANN. §12.02 (Supp. 1982-83).

[4] TEX. FAM. CODE ANN. §13.21(b) (Supp. 1982-83).

nity.[5] Texas courts may not override parental legitimation decisions unless one or both biological parents invoke

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[5] TEX. FAM. CODE ANN. §§13.01-13.09 (Supp. 1982-83). The paternity and voluntary legitimation provisions are part of the same Family Code chapter, Chapter 13. Nothing stops an alleged or putative father from seeking to establish paternity under the provisions of §§13.01-13.09. The express language of §13.02(b) includes the "alleged father" as a possible paternity suit petitioner. Therefore, there is a Texas statutory construction issue which was not raised and has not been ruled on in the courts below, that issue being: "Can a biological father circumvent the provisions and policy of §13.21(b) by pleading that he is the father, insisting upon blood tests, and proving that he is the father by scientific means rather than by the mother's admission?" An affirmative answer would, in the opinion of your Amicus Curiae, be absurd, and would mean that §13.21(b) is mere surplusage applicable only to a bizarre class of biological fathers defined only by their attorneys' lack of ability to read and understand the law. As a practical matter, *any suit to establish the parent-child relationship brought by a man claiming to be the biological father is a voluntary legitimation suit.* If the issue of paternity is disputed, as in a case in which the mother in bad faith disputes the father's parentage, it may also be a paternity suit. The specific provisions of §13.21(b) are compatible with and control the general provisions of §§13.01-13.09. "It must not be presumed, when construing a statute, that the Legislature intended to provide for an absurdity. . . ." *Hunter v. Whiteaker & Washington*, 230 S.W. 1096, 1097 (Tex. Civ. App.—San Antonio 1921, writ ref'd). All parts of a statute should be given effect. Courts, in construing statutes, should follow the presumption that every word in a statute is used for a specific purpose, not as mere drafting surplusage. *Jessen Associates, Inc. v. Bullock*, 531 S.W. 2d 593, 600 (Tex. 1975)

Your Amicus Curiae does not believe that there is any merit to the argument that Texas law establishes equality between unwed fathers and other parents in those cases in which the father files a "paternity" suit but not in those cases in which he labels his cause of action "voluntary legitimation." The idea is absurd. Your Amicus Curiae understands that the Texas Attorney General has filed a brief in this Court suggesting that the writ has been improvidently

the court's jurisdiction to resolve a dispute between themselves.

The child's mother and managing conservator refused to consent to legitimation (J.A. at 45a-52a). Alleging legitimation to be in the child's best interest, Kirkpatrick asked the trial court to give consent as provided for Family Code §13.21. In the trial court, Kirkpatrick never suggested that the statute under which he sought relief might be unconstitutional on its face or unconstitutionally applied to him.[6]

A final hearing on the merits was held on August 28, 1981 (J.A. at 96a-399a). The parties waived their right to a jury trial and submitted all fact and law issues to the trial judge. The judge found that although Kirkpatrick would be fit to raise a child at some point in his life, he was not a proper person to raise the child involved in this suit.[7] Ac-

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granted on the grounds that Kirkpatrick failed to avail himself of the appropriate remedy, legitimation through proof of paternity. Your Amicus Curiae, while being of the opinion that the writ may have been improvidently granted for other reasons, believes that the Attorney General's argument is nothing more than an attempt to shield the Texas voluntary legitimation statute from constitutional scrutiny by this Court and should be rejected. The statute stands on its own merits. Rejection of the idea that under Texas law a biological father can circumvent the requirements of §13.21(b) is implicit in the Texas Supreme Court's writ refusal in this case and in its opinion in *In the Interest of T.E.T.*, 603 S.W. 2d 793 (Tex. 1980), *cert. den. sub nom. Oldag v. Catholic Charities*, 450 U.S. 1025 (1980).

[6] Kirkpatrick did not ask the trial court to declare any Texas statute unconstitutional. He could have challenged the constitutionality of the statute pursuant to TEX. REV. CIV. STAT. ANN. art. 2524-1 (1965).

[7] The trial judge, in announcing his decision, stated: "The Court finds that this young man here would, in fact, be a proper person to have parental rights under perhaps other circumstances, if it was other circumstances. Those circumstances do not now exist." (J.A. at 379a).

cordingly, the trial judge denied Kirkpatrick's legitimation request and terminated the parent-child relationship between the child's mother and the child (J.A. at 70a-78a).

On appeal, Kirkpatrick for the first time alleged that Family Code §13.21 violated the due process and equal protection guarantees of U.S. CONST. amend. XIV, §1. The Court of Civil Appeals affirmed (J.A. at 400a-414a). The Texas Supreme Court, finding no reversible error, refused further review (J.A. at 415a). On January 17, 1983, this Court granted Kirkpatrick's petition for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

The "Questions Presented for Review" by Petitioner Kirkpatrick (Brief for the Petitioner, pp. i-ii), while sufficiently clear to give notice that Petitioner is attacking the Texas voluntary legitimation statute on Fourteenth Amendment Due Process and Equal Protection grounds, should be narrowed and rephrased in order to conform with the facts and with the judgments and decisions of the courts below. There is no state court judgment terminating the parent-child relationship between Kirkpatrick and the out-of-wedlock child who is the subject of this litigation. There is only a judgment denying that such a relationship exists and terminating "all rights in and to Baby Girl S. which Donald J. Kirkpatrick may have. . . ." Therefore, your Amicus Curiae offers the following restatement of the Questions Presented for Review:

1. May Texas, without demonstrating parental unfitness, and pursuant to the "best interests of the child" standard, refuse to grant the biological father of an out-of-wedlock child full parental rights and terminate those rights in and to such child which the biological father may have solely by virtue of his biological parentage in those cases in which (a) the child's mother refuses to consent to the father's acquisition of parental rights and (b) the child's mother and father have never cohabited as a family?

2.a. May Texas apply an unfitness standard in proceedings to terminate the parent-child relationship between out-of-wedlock children and in-wedlock fathers, in-wedlock mothers, and out-of-wedlock mothers, but apply a "best interests of the child" standard in proceedings to terminate those rights in and to an out-of-wedlock child which the out-of-wedlock father of such child may have solely by virtue of his biological parentage?

b. Does such differentiation represent unconstitutional discrimination on the basis of illegitimacy and gender?

3. May Texas in contested legitimation cases require an out-of-wedlock father to satisfy a burden of proving that the child's best interests would be served before recognizing him as a legal as well as a biological father?

SUMMARY OF ARGUMENT

Don Kirkpatrick, at age 23, had no business having sexual relations with an immature 15-year-old schoolgirl. The right to procreate does not include the right to commit felony sexual assault or to impregnate unwed teenagers. Kirkpatrick's sperm impregnated an egg in R.L.S.'s body. He has no other relationship with Baby Girl S. On that basis alone he claims the status and rights of a legal parent that he would have obtained by establishing a family through marriage. Parental rights, however, do not automatically flow from biological parentage. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Kirkpatrick has had notice, an opportunity to be heard, and an opportunity to have his case reviewed by appellate tribunals. He has had the procedural due process mandated by *Stanley v. Illinois*, 405 U.S. 645 (1972).

Kirkpatrick's equal protection arguments ignore the realities of out-of-wedlock conception, pregnancy, and birth. Men and women are not similarly situated with respect to the problems and risks of sexual intercourse.[8]

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[8] *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981).

Unintentional out-of-wedlock pregnancy has become a major social problem. The State has a substantial and compelling interest in preventing such pregnancies and in protecting the physical and mental health of unwed mothers and their children. The State has a substantial and compelling interest in protecting the unwed mother's right to make her decision whether to abort or give birth without fear that her plans for the child may be vetoed by the father without regard to the child's best interest. The State has a substantial and compelling interest in allowing the unwed mother to decide to retain or release parental rights with assurance that if she chooses adoption, her plans may not be vetoed arbitrarily by the child's biological father if adoption is the best alternative for the child.

What at first appears to be gender-based inequality in Texas legitimation law is really the State's method of balancing three different interests: that of the child, of the mother who has rejected abortion and chosen life for the child, and of the father, who is given a chance to establish parental rights out-of-wedlock under appropriate circumstances. Under Texas law, the child's mother cannot arbitrarily prevent any biological father from acquiring full parental rights. When the mother seeks to place a child for adoption and the father seeks legitimation, neither party can prevail over the other without proof of the child's best interest. The "best interest" test as applied in this case and others like it is neutral and favors neither men nor women.

Gender-based distinctions which serve important governmental objectives and are substantially related to achievement of those objectives are not proscribed by the Equal Protection Clause. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979). Conditioning legitimation on proof of best interest in contested cases prevents men who impregnate women to whom they are not married from acquiring parental rights inconsistent with the child's best interest, promotes the physical and mental health of unmarried pregnant women, and allows unwed mothers to make decisions concerning abortion and adoption without being "coerced by circumstances" into unwanted abortions or

into keeping children they are ill-equipped and would be otherwise unwilling to raise. The minor inequality between the substantive rights of mothers and fathers of out-of-wedlock children is well-justified in light of the important state interests protected.

ARGUMENT

I.

THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER KIRKPATRICK'S COUNTERCLAIM FOR VOLUNTARY LEGITIMATION DID NOT DEPRIVE PETITIONER OF SUBSTANTIVE OR PROCEDURAL DUE PROCESS OF LAW

A. Introductory Statement

Petitioner Kirkpatrick should never had sexual relations with 15-year old R.L.S. He was, in his own words, "older and should have known better" (J.A. at 394a).[9] Unfortunately, there are many men and boys like Petitioner who impregnate teenage girls.[10]

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[9] The acts of intercourse occurred in Nebraska and violated NEB. REV. STAT. §28-319 (1979). At trial, no party offered into evidence the Nebraska sexual assault statute. Therefore, the trial judge was entitled to assume that Nebraska law was equivalent to Texas law. *Braddock v. Taylor*, 592 S.W.2d 40 (Tex.Civ.App.—Beaumont 1979, writ ref'd n.r.e.). Under Texas law, Kirkpatrick's actions would have been punishable as "rape of a child," a felony of the second degree. TEX. PEN. CODE ANN. §21.09 (Supp. 1982-83).

[10] The State may constitutionally set age requirements for marriage. "Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, and that no one can marry who has a living husband or wife." *Zablocki v.*

The rise in teenage pregnacy presents Texas and other states with enormous social problems. A recent study estimates that in 1980 alone 998 babies were born to Texas mothers 14 years of age or younger.[11] That study also estimates that:

1. Of the over 2,000,000 Texas teenagers between the ages of 15 and 19, one-half of the boys and one-third of the girls are sexually active;
2. Only 49% of teens use contraception at first intercourse, withdrawal being the most common method used;
3. Approximately 92,295 Texas girls between the ages of 15 and 19 became pregnant in 1980;
4. Half of those girls became pregnant out-of-wedlock;
5. Of the 92,295 pregnancies, 49,093 resulted in live births, 27,247 were terminated by voluntary abortion, and the remainder ended by miscarriage;
6. Maternal death is 60% higher for these teens than for mothers between the ages of 20 and 24;
7. The risks of congenital malformation, low birth weight, birth injury and infant death are greater for babies born to teenagers than for other babies;
8. The suicide rate among pregnant teenage mothers is seven times greater than among their non-pregnant peers;
9. Teenage mothers are more likely than other parents to abuse and neglect their children;
10. 95% of unmarried teen mothers keep their babies; and

Redhail, 434 U.S. 374, 392 (1978) (Stewart, J., concurring). The State may also send men to jail for having intercourse with underage girls to whom they are not married. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). These laws may deter, but obviously do not stop, teenage sexual activity.

[11] Texas House of Representatives, *Final Report of the Select Committee on Teenage Pregnancy* (October 1, 1982), p. 5.

11. Eight out of ten teenage mothers never finish high school.[12]

Kirkpatrick knew that unintentional pregnancy might result from his illegal actions. As a result of his own irresponsibility, he was forced to ask the State's permission to acquire parental rights, that permission having been refused by the child's mother. His only complaint in this Court is that Texas courts refuse to grant him affirmative relief found to be contrary to the child's best interest.

By voluntarily engaging in sexual relationships with unmarried teenage girls, men such as Don Kirkpatrick implicitly consent to application of reasonable state regulations designed to protect unwed mothers and their children. If Kirkpatrick did not like the rules through which responsibility for out-of-wedlock children is determined, he should have abstained from out-of-wedlock intercourse or utilized better contraceptive methods. He may not secure parental rights simply by admitting his past indiscretions and apologizing for the continuing harm being done to the child's mother. The State may

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[12] Texas House of Representatives, *Final Report of the Select Committee on Teenage Pregnancy* (October 1, 1982), pp. 5-6. Why do teen girls such as R.L.S. engage in intercourse in the first place? For some teen mothers, the answer is simple. It is difficult for an immature girl to say "No" to a boyfriend about whom she really cares. In this case, there is no question but that Kirkpatrick and R.L.S. were strongly attracted to one another. Other reasons suggested by Planned Parenthood as reasons for teen intercourse include: (a) trying to cure loneliness or unhappiness; (b) hoping to become popular; (c) using physical sex to avoid having a close, caring relationship; (d) worrying that it is the only way not to appear homosexual; (e) wanting to discover the "fireworks" that always go with sex on TV, records, movies, magazines, and books; (f) believing that "the first time" is not important so just get it over with; and (g) proving their independence, especially to parents they're angry with. Planned Parenthood Federation of America, Inc., "TEENSEX? It's okay to say NO WAY" (Planned Parenthood Federation of America, Inc., Pamphlet No. 1592, 1981).

constitutionally require a finer balancing of the respective rights of father, mother, and child. Kirkpatrick has been denied neither procedural nor substantive due process by the subordination of his rights to the welfare of the child conceived as a result of his illegal behavior.

B. **Kirkpatrick Has Not Been Denied Procedural Due Process.**

Kirkpatrick has had notice, access to all discovery methods available under Texas law, an opportunity to be heard in person and by attorney, an opportunity (unexercised) for a jury trial, an opportunity to present evidence, an opportunity to confront opposing parties and adverse witnesses, an opportunity (unexercised) to challenge the constitutionality at trial of the rules determining the outcome of his case, and an opportunity to have his case reviewed for error by appellate tribunals. He has had all procedural protections available to civil litigants in Texas and all procedural protections mandated by the Fourteenth Amendment.

Kirkpatrick contends, however, that the "best interest of the child" test is unconstitutionally vague and overbroad, that it fails to give him notice as to which behavior is permitted and which prohibited, that it is susceptible to subjective, arbitrary, and capricious application by different factfinders, and that it delegates to judges and juries basic policy decisions which should be determined by legislatures rather than by courts. Judges and juries, according to Kirkpatrick, cannot be trusted to make best interest determinations. Under Kirkpatrick's theory, they would be reduced to considering "objective" facts such as the fact of biological paternity.

Kirkpatrick apparently is unaware that the "best interest" standard has acquired an established core of meaning under Texas law. In *Holley v. Adams*, 544 S.W. 2d 367, 372 (Tex. 1976), the Texas Supreme Court identified factors to be considered by trial and appellate courts in making and reviewing best interest determinations:

> "(A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C)

the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent."

Kirkpatrick asserts that the record in this case illustrates how easily the best interest test may be misapplied. This is an attempt to secure reversal of the courts below on evidentiary grounds. Kirkpatrick fails to mention that there was significant unrebutted testimony about the danger of emotional injury to the child resulting from the antagonism between the child's biological parents and their families.[13]

Kirkpatrick suggests that best interest considerations standing alone are insufficient grounds for denying him parental rights. In his case, however, as in contested legitimation cases generally, *other facts were proven*

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[13] Kirkpatrick did not oppose termination of the parent-child relationship between R.L.S. and the child and testified that if the court gave him parental authority over the child, he would never go around the child's mother or try to contact her or her family (J.A. at 207a-208a). He would, however, tell the child the name of her mother (J.A. at 208a). He did not explain how he would explain the mother's absence to the child.

Nancy Miller, the only witness called to testify as an expert, expressed concern that Kirkpatrick's parents would reveal to the child their feeling that the child's mother had "given the child away" because she did not love or care for the child. Communicating that message to the child would be damaging to the child (J.A. at 358a-359a). Kirkpatrick's father had earlier testified that a person considering "giving away a child" was not showing concern about the child's best interests (J.A. at 274a).

before the best interest test could be applied: (1) that he impregnated a woman; (2) that he was not married and had never established a family relationship with that woman or the child; and (3) that neither the child's mother nor managing conservator consented to legitimation. The best interest test does not stand alone. It is not and was not in Kirkpatrick's case applied in a vacuum.

Although Texas no longer condemns fornication between consenting adults as a crime, the Texas legitimation laws make clear that any man who impregnates a woman to whom he is not married must, in order to secure parental rights with respect to an out-of-wedlock child, be prepared to demonstrate in court either that the mother consents to legitimation, that he has established a family relationship with the child's mother or the child, or that legitimation is in the child's best interest. The Texas legitimation laws are not unconstitutionally vague.

This is not a case (such as *Stanley* or *Caban*) in which evidence has been presented proving that the biological father has lived with, raised, and supported the child or, with consent of the child's mother, regularly visited and established a personal relationship with the child. In this case, Kirkpatrick illegally and accidentally impregnated a teenage mother, never established a family relationship with her or with the child, and failed to secure consent to legitimation from the child's mother or managing conservator.

Kirkpatrick, however, claims that he is unable to determine from Texas statutes what behavior Texas finds objectionable (Petitioner's Brief, pp. 40-41). He need look no further than TEX. PEN. CODE ANN. §21.09 (Supp. 1982-83), the Texas statutory rape ("rape of a child") law. Kirkpatrick is charged with knowledge of the laws forbidding sexual relations with unmarried minors. He knew it was wrong to have intercourse with a 15-year old girl and should have known that having intercourse with R.L.S. violated NEB. REV. STAT. §28-319 (1979). Kirkpatrick, whose behavior was well beyond the boundaries of acceptability in his home state and in the State of Texas, is the wrong petitioner to complain about being unable to deter-

mine what behavior is and is not acceptable.

Judges and juries are not incompetent to make best interest determinations. Best interest determinations are made as a matter of course in custody proceedings. Judges are well able to adjudicate best interest issues in termination and voluntary legitimation situations. Appellate courts are able to remedy abuses of discretion in the making of best interest determinations.[14] If judges, juries, and appellate courts cannot make and review best interest decisions, the main body of American custody law will have to be replaced.

The Texas Legislature has instructed the courts to apply the "best interest" test in legitimation suits only if the child was conceived and born out-of-wedlock and the mother and managing conservator refuse to consent to legitimation. The Legislature need not define "best interest" nor define the relative weights to be given the "best interest" factors in individual cases. The Legislature cannot make decisions concerning the welfare of each child born out-of-wedlock to biological parents who disagree on legitimation. There is nothing impermissible about delegating to courts power to make case-by-case child welfare decisions on "best interest" grounds rather than on more specific, "objective" grounds which do not take into consideration the totality of a child's needs.

C. Kirkpatrick Has Not Been Denied Substantive Due Process.

Biological fathers of out-of-wedlock children have substantive due process rights. The question is: "What are those rights and how should they be balanced with the

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[14] See, *e.g.*, *Ervin v. Wichita County Family Court Services*, 533 S.W. 2d 947 (Tex. Civ. App.—Fort Worth 1976, no writ) (judge abused discretion in finding that termination would be in children's best interest based on evidence that mother left her children with a cousin for several days, that she did not return on schedule, that she returned accompanied by a "colored" family, and that the children had suffered colds but were otherwise healthy).

rights of the mother and with the rights of the child?"[15]

Kirkpatrick and the child's mother never married or lived together. After the child's birth, Kirkpatrick and R.L.S. made no agreement concerning the child. Kirkpatrick did, however, promise to acquiesce in the mother's plans for adoption (J.A. at 206a, 344a). Kirkpatrick has never seen the child. The State is not forcing the breakup of a family unit or breaking up a relationship between Kirkpatrick and the child.

This case cannot be analogized to abuse or neglect proceedings in which a state, on its own initiative, seeks to remove a child from an existing family unit, formal or informal. The State is not intruding into the privacy of family affairs. Kirkpatrick is asking the State to give him

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[15] Kirkpatrick ignores the balancing of rights issue. As 1984 approaches, it is, perhaps, appropriate that Kirkpatrick engages in Orwellian Newspeak to the effect that "The best interest of a child is contrary to the best interest of the child" and that "The best way to protect pregnant women is to take away from them the opportunity to make decisions concerning the welfare of their children."

Instead of dealing with the realities of *the mother he impregnated*, Kirkpatrick speaks only in general terms about the right of women to be free of the stereotypic child-caring role:

> "Less obvious but equally invidious is the harm done to women generally by perpetuation of such stereotypes. As a result, women are locked into the child-caring role and unable to share child-caring responsibilities equally with men. Great harm, both psychological and social, is done to women and men who do not fit the stereotyped mold. Women are unfairly condemned by society when they lose or relinquish custody of their children, and men disparaged when they assume primary caretaking and nurturing roles."

(Petitioner's Brief, pp. 70-71). None of this discussion suggests that it would be better for R.L.S. (or better for the child) that R.L.S. turn the child over to Kirkpatrick and his family, who have already condemned her at trial for her desire to relinquish child-caring responsibility for this child. The end result is to ignore the mother's and child's rights entirely.

parental rights over the objection of the teenage girl he illegally and irresponsibly impregnated.

Parental rights do not automatically flow from biological parentage. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), paternity was undisputed. Quilloin, the father of an out-of-wedlock child, contended that he could not be denied veto power over a proposed adoption absent a showing of his parental unfitness. His legitimation request was refused solely on "best interest" grounds. Speaking through Justice Marshall, the Court *unanimously* held that ". . . under the circumstances of this case appellant's substantive rights were not violated by application of a 'best interests of the child' standard." *Id.*, 434 U.S. at 254.[16] The "best interest" test may be constitutionally applied and is not constitutionally infirm on its face as violative of substantive due process.

Texas must have a mechanism for determining whether or not the father of an out-of-wedlock child will be recognized as a legal parent. The husband-father automatically qualifies as a legal parent; the forcible rapist rarely will.[17] The standard employed to determine

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[16] The statute involved in *Quilloin* and the statute involved in this case may be constitutionally applied and are not facially unconstitutional. It does not help Kirkpatrick to argue that the statute, as applied to others differently situated, might be unconstitutionally applied. ". . . [A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

[17] The husband-father qualifies automatically through marriage, the primary social institution through which the privacy and autonomy of family life are shielded from state intervention and pursuant to which husband and wife *agree* to share joint responsibility for the children conceived and born to the mother during marriage. The forcible rapist will qualify as a parent only if the mother files and wins a paternity suit for the purpose of collecting support from him.

which fathers will and will not be allowed to exercise parental rights should not give the child's mother an opportunity to prevent arbitrarily the father's acquisition of parental rights, should be flexible enough to allow appropriate decisions under a wide variety of circumstances, and should be fair to the child as well as to the child's parents. The best interest test may not be perfect but it is the most appropriate test available when the State is asked to create a "family" relationship between nonconsenting parties rather than to break up an existing family relationship. The best interest test can be sensibly applied to a wide variety of situations, is sexually neutral, and does not favor fathers over mothers or mothers over fathers. The best interest test favors the child over both parents so that legitimation cannot be blocked by the mother or forced over her objection except to protect the child's best interest. No fairer balance is possible. The best interest test, limited as it is under Texas law to application only under special fact situations (such as out-of-wedlock childbirth resulting from sexual relations between parents not cohabiting as a family unit) meets the requirements of substantive due process.

II.

THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER KIRKPATRICK'S COUNTERCLAIM FOR VOLUNTARY LEGITIMATION DID NOT DEPRIVE PETITIONER OF EQUAL PROTECTION UNDER THE LAW

Kirkpatrick contends that he, as a male biological parent, must be given substantive rights identical to those of a female biological parent. He implies that establishing a mechanistic and undiscriminating equality between men and women is more important than protecting the welfare of children. He asserts that substantive grounds for terminating "parent-child relationships"

must be universally applicable to all biological parents, male and female, married or unmarried. Carried to its extremes, Kirkpatrick's theory is that the parental rights of rapist and victim are equal, that the parental rights of sperm donor and donee are equal, and that the parental rights of an adulterous wife and her lover are equal and superior to those of the wife's husband. These results are compelled by simplistically equating parental rights with proof of biological parentage.

Presumably, Kirkpatrick would apply this rule of absolute equality over the full range of accidental pregnancy situations: (1) incest; (2) forcible rape; (3) casual intercourse under the influence of alcohol or drugs; (4) prostitution; (5) promiscuity; (6) contraceptive breakdown; (7) mistake or deception by either parent concerning reproductive capacity; (8) mistake or deception concerning the adequacy of contraceptive methods used; (9) immature adolescents' first episodes of sexual intercourse; (10) casual sex between people having no desire for a permanent relationship with one another; (11) premarital sex between teenagers who, in the heat of the moment, think that they are "in love" with one another; (12) extramarital sex between a woman and a man other than her husband; and (13) extramarital sex between a man and a woman not his wife. Kirkpatrick would apparently apply the test of equality in these situations as well as in cases such as *Caban* and *Stanley* which involved long-standing relationships between father, mother, and child.

Kirkpatrick would have no gender-based complaint if legitimation were conditioned on paternity alone and the parental rights termination statute amended to include new sections disposing of fathers (and mothers) who should not have parental rights. To eliminate gender-based distinctions, Kirkpatrick would have the Texas Legislature amend TEX. FAM. CODE ANN. §15.02 to read as follows:

> "A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

"(1) the parent has:

"...

"(L) raped the other parent, thereby resulting in conception of the child;

"(M) engaged in sexual relations with a person to whom such parent is not married, thereby resulting in accidental conception of the child; or

"(N) voluntarily engaged in an incestuous relationship with the other parent, thereby resulting in conception of the child; and

"(2) termination is in the best interest of the child."

That solution, while establishing equality between the sexes, would also authorize extensive state intervention in the lives and personal affairs of unmarried persons, including unmarried parents who might agree to voluntary legitimation of their out-of-wedlock children. In contrast, the existing gender-based legitimation statute minimizes state interference with mother-child relationships and authorizes state interference with father-child relationships only when disputes concerning legitimation arise between unmarried biological parents.

It is far more important to have legislation which minimizes state interference with consensual family relationships than it is to have legislation that rigidly and irrationally ignores legitimate gender-based distinctions. Although the Texas voluntary legitimation statute does not establish perfect equality between the sexes, the degree of inequality is minimal and justified by compelling state interests.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Gender-based distinctions which serve important governmental objectives and are substantially related to achievement of those objectives are not proscribed by the Equal Protection Clause. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979).

Men and women are not similarly situated with respect to the problems and risks of sexual intercourse (in-

cluding unintentional conception and the consequences thereof).[18] Men do not suffer the pains and burdens of pregnancy, nor must they make the decision whether or not their out-of-wedlock children will be born or aborted.[19]

Whatever his *moral* obligations may be, the biological father of an out-of-wedlock child is not legally responsible for the child until the child has been born and legitimated. He may delay decision-making until after the child's birth.[20] The mother cannot.[21]

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[18] "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981). Those consequences do not end immediately upon birth of the child as Petitioner suggests.

[19] In making her decision to abort or give birth, the mother may consider many factors. "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved." *Roe v. Wade*, 410 U.S. 113, 153 (1973).

[20] Reprehensible though it may seem, the father may wait until the baby's sex and health are known. Some fathers file legitimation suits as a gambit to force the mother to drop statutory rape charges. Still others file legitimation suits in an effort to coerce the mother into marriage. In this case, R.L.S. testified that ". . . I feel like by getting the child maybe he thought he would get me." (J.A. 153a). Kirkpatrick denied using the suit as a means of persuading R.L.S. to marry him (J.A. at 201a). Nancy Miller, however, testified that on the day before R.L.S. signed her relinquishment affidavit,

The constitutionally protected right of the mother to decide whether to abort or give birth, *Roe v. Wade*, 410 U.S. 113 (1973), is so important that not even a pregnant

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Kirkpatrick asked her if R.L.S. might come back to him if he refused to sign the papers and tried to get the baby (J.A. 343a).

Some biological fathers postpone decision-making because of the unpleasantness of the task. In this case, Kirkpatrick could not possibly satisfy the desires of R.L.S. and her family and the desires of his own parents, upon whom he appeared at trial to be financially dependent. He wavered back and forth between alternative courses of action. At trial, R.L.S.'s mother commented about Kirkpatrick's indecisive behavior (J.A. at 288a). Agency representative Nancy Miller observed that same indecisiveness (J.A. at 342a-344a).

Some possible biological fathers desire to wait until they can verify their paternity. In some cases, they have no way of being sure that they are fathers at all. It is not unusual for an alleged father to take the attitude before birth that he will be responsible for the child *if* he is the child's father but not otherwise. This is a serious problem for an unwed mother who has had sexual relations with more than one man during the period of possible conception.

If two or more men are possible fathers, must each be given a chance to determine through blood testing and other methods which is the real father before being called upon to seek voluntary legitimation? Can the State require the alleged biological father to make a commitment *before birth* even though proof of parentage cannot be established until after birth?

Legislators desiring to cope with the problems of unwed teenage mothers are hesitant to deal with the real differences between mothers and fathers for fear of violating the Equal Protection Clause. That fear impedes meaningful legislative action even in situations in which gender-based differentiations are absolutely essential.

[31] "While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility with respect to the child. To classify him as a parent simply because he is the biological

woman's husband or parents, if she is competent, may veto her decision. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 662 (1979). The State has an interest in giving the child's mother an appropriate climate in which to make that decision. The mother is entitled to know the consequences of her decision. If she gives birth to the child, will she be allowed to raise the child without interference from the father? Will the father be allowed to legitimate the child over her objection? Will the father be awarded custody and the right to collect child support from her? Will she be able to place the child for adoption? Will she be able to make decisions which protect the child's welfare, or will her decisions be thwarted by the biological father even if she makes the decision that is best under the circumstances? Wrong answers to these questions may lead unmarried mothers to abortion when they would prefer to give birth and place the children for adoption. The State has a legitimate interest in permitting the competent mother to make the decision she thinks right for herself and the child and to make that decision without fear that it may be overridden by the biological father absent proof of best interest.

After birth, the child's mother must make arrangements for the child's care. She must decide whether to raise the child herself or to release the child for adoption. She must make these decisions in a climate of uncertainty. Under existing Texas law, if she gives birth to the child, she cannot be sure that the child will grow up in an environment that she considers suitable. If she decides to retain her parental rights, she cannot even be sure that

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father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother. All must agree that an unmarried fourteen-year-old high school freshman has a serious problem when she discovers that she is pregnant and she needs all the options that the State can properly make available to her." *In the Interest of T.E.T.*, 603 S.W. 2d 793, 797 (Tex. 1980), *cert. den. sub nom. Oldag v. Catholic Charities*, 450 U.S. 1025 (1980).

she will be awarded custody of the child. The "best interest" test which allegedly discriminates against men also permits juries to award custody of children to their fathers. TEX. FAM. CODE ANN. §14.01 (1974) prohibits juries in custody cases from making decisions based upon the sex of a parent. The pregnant mother of a child to be born out-of-wedlock must live with the possibility that the biological father may seek and obtain legal custody and child support as well. If she has any legal awareness, she will know that by counseling with an adoption agency, she may prejudice her rights in any custody dispute she might later have with the father. Many jurors and judges share the anti-adoption bias displayed by Don Kirkpatrick's father during the trial (J.A. at 274a). For many people, a person who considers "giving a baby away" is totally unfit to be a parent. These are the realities with which an unwed mother must deal.

Texas statutes, unlike the statutes involved in *Caban v. Mohammed, supra*, do not enable the child's mother to cut off arbitrarily any biological father, not even a convicted rapist. The mother must identify the biological father in a sworn affidavit. TEX. FAM. CODE ANN. §15.04 (Supp. 1982-83). The father, if identifiable, must be given legal notice of any suit in which the mother's rights may be terminated. TEX. FAM. CODE ANN. §11.09(a)(8) (Supp. 1982-83). In that suit, he may counterclaim for voluntary legitimation. His opportunity to convince the judge and jury what is best for the child is no different from that of the mother. He may force voluntary legitimation over the mother's objection, block her plans to release the child for adoption, and secure custody of the child.

The burden of decision-making rests heavily upon the unmarried mother at a time when her body and mind are subjected to the physical and emotional stresses of pregnancy. Those stresses are reflected in the suicide rate of teenage mothers. The State, by establishing substantive legal rules which place the rights of the child over the rights of the biological parents, furthers its interest in preserving the physical and mental health of out-of-

wedlock mothers by giving them needed assurance that, in the event of a conflict with the child's father, the court will base its decision on what is best for the child.

The State's interest in protecting the mother's physical and mental health is related to the State's interest in protecting the health of the unborn child.[22] The mother's physical and mental health may have a significant effect on the child's growth and development. Mothers who conceal pregnancy by starving themselves starve their unborn children as well. Emotionally insecure mothers who indulge during pregnancy in drugs or alcohol as an escape from their problems can do irreversible damage to their unborn children.

The unwed mother, in deciding between birth and abortion, desperately needs assurance that, if she chooses life for the child, her plans for the child's future cannot be vetoed unless a judge or jury finds that it would be in the child's best interest to do so. In making child care plans for the child, the unwed mother should be allowed to consider all her options—keeping the child, allowing the father to raise the child, or placing the child for adoption—with assurance that the plan she chooses will not be overridden without a judicial determination that it would be in the child's best interest to do so.

The State, by requiring proof of best interest before overriding a mother's refusal to consent to voluntary legitimation, allows the unwed mother during pregnancy and after birth to know that her plans for the child will not be frustrated unless a judge or jury finds that the child's welfare will be promoted by so doing. Given the realities of out-of-wedlock conception, pregnancy, and birth, requiring the father to prove best interest in cases in which no family unit has ever existed is more than fair.

The mother who wishes to avoid the stigma of raising an out-of-wedlock child will undoubtedly wish to avoid the even greater stigma of having the father raise the child in

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[22] The State has an interest in protecting potential life. *Roe v. Wade, supra,* 410 U.S. at 154.

her home town. She may feel "coerced by circumstances" into getting an abortion she does not desire. In getting that abortion, she may abandon long held religious beliefs and alienate family members and friends who believe that abortion is equivalent to murder. If such a mother seeks adoption instead of abortion as her plan for the child and a neutral fact finder determines that adoption is best for the child, the Equal Protection Clause does not compel turning the child over to the child's father, whose illegal conduct or sexual irresponsibility was responsible for creating the problem in the first place. For men and women who desire less interference from the State in their private affairs, the "safe harbor" of marriage is always available.

No unwed mother should be "coerced by circumstances" into raising a child she does not wish to raise. Many unwed mothers feel that adoption is the best option for their children and that the second best option would be raising their children themselves. They may feel, correctly or incorrectly, that the worst alternative for the child would be releasing the child to the child's father and his family. Realizing that by seeking adoption she increases the probability that the father will be able to win custody of the child, such a mother is likely to "settle for second best," reject adoption as an alternative, and raise the child herself in order to protect the child from what she considers to be the worst alternative. This may be tragic for the child if the mother is physically and emotionally unprepared for parenthood, and if she blames the child for interfering with her continued education, career opportunities, and ability to find a compatible mate.[23] If

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[23] There is no requirement under Texas law that a mother notify the biological father of her pregnancy. If she wishes to avoid the risk of the biological father's becoming involved, nothing stops her from moving to another community and disappearing entirely. She may then raise the child without risk of interference by the father. Only if she chooses to seek child support from the father or to place the child for adoption must she notify the father of the pregnancy.

the mother, seeking what is best for the child, runs the risks involved in placing a child for adoption, she needs assurance that her plans will not be defeated without proof that the child will benefit by overriding her decisions.

The only significant difference between the rights of men and women under Texas legitimation law is that in contested legitimation cases the biological father must satisfy the best interest test in order to acquire parental rights. This apparent inequality is more illusory than real. The mother cannot stop the father from acquiring full parental rights unless it is in the child's best interest that he be denied them. When the mother seeks to place a child for adoption and the father seeks to legitimate the child, neither party can prevail without proof of best interest. The statute in context operates neutrally.

TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83) does not explicitly assign the burden of proof to either party.[24] Placing the burden of proof on the father makes sense. He is the petitioner seeking relief. He has more access than anyone else to information about himself and he has access to all the discovery tools available to litigants in civil cases generally. If he fails to use these tools wisely, and if he fails to present a satisfactory case at trial, he has no one to blame but himself. Ordinarily, the burden of proof must fall somewhere. In legitimation cases, it is fair to place that burden on the father.

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[24] The Texas Supreme Court has not assigned the burden of proof and has not been called upon to decide where that burden should fall. See *In the Interest of K*, 535 S.W. 2d 168 (Tex. 1976), *cert. den.* 429 U.S. 907 (1976), and *In the Interest of T.E.T.*, 603 S.W. 2d 793 (Tex. 1980), *cert. den. sub nom. Oldag v. Catholic Charities*, 450 U.S. 1025 (1980).

One Texas appellate court, in a case not reviewed by the Texas Supreme Court, has held that the burden of proof falls upon the party petitioning for legitimation. *In the Interest of C____ D____ V____*, 589 S.W. 2d 543, 547 (Tex. Civ. App.—Amarillo 1979, no writ).

The Texas voluntary legitimation statute makes a legitimate, appropriate, and necessary gender-based distinction between mothers and fathers of out-of-wedlock children. The inequality established by that differentiation is minimal, reflects the reality that men and women are not similarly situated with respect to the problems and risks of out-of-wedlock sexual intercourse and unplanned pregnancy, and is necessary to balance equitably the rights of the child and the child's biological parents without authorizing unwarranted intervention by the State in consensual family relationships. The gender-based distinction can be used only to protect the welfare of the child and cannot be arbitrarily applied to prevent legitimation of an out-of-wedlock child. TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83) as applied to Petitioner Kirkpatrick and men like him is constitutional.

CONCLUSION

For all the foregoing reasons, the National Committee for Adoption, Inc., Amicus Curiae, respectfully requests that this Court affirm the judgment of the courts below and rule that TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83), as applied to the facts of this case, is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 1983, three copies of the above and foregoing Amicus Curiae Brief were served by mail on all parties required to be served by depositing same, enclosed in an envelope with first-class postage prepaid, certified, return receipt requested, in an official depository under the care and control of the United States Postal Service, addressed to counsel of record as follows:

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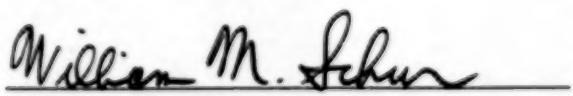

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March 14, 1983

William M. Schur
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Re: Kirkpatrick v. Christian Homes of Abilene, Inc.

Dear Mr. Schur:

As counsel for petitioner Donald Kirkpatrick, I hereby consent to the filing of a brief amicus curiae by the National Committee for Adoption.

Very truly yours,

Marcia Robinson Lowry

Marcia Robinson Lowry

MRL:mab

RHODES & HEATHERLY

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March 16, 1983

Mr. William H. Schur
Attorney at Law
1200 Oil & Gas Building
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Re: Donald J. Kirkpatrick v. Christian Homes of Abilene, Inc.; No. 82-647

Dear Mr. Schur:

I hereby give written consent on behalf of Christian Homes of Abilene, Inc. to your filing of an amicus curiae brief on behalf of The National Committee for Adoption, Inc. in the above referenced cause now before the United States Supreme Court. The filing deadline for Respondent's Brief on the Merits is March 23, 1983.

Yours truly,

RHODES & HEATHERLY

Charles E. Myers
Attorney of Record for
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brs

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An Equal Opportunity/
Affirmative Action Employer

March 16, 1983

Mr. William M. Schur
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Re: Kirkpatrick v. Christian Homes of Abilene, Inc.

Dear Mr. Schur:

The State of Texas does not oppose the timely filing of an amicus curiae brief on behalf of the National Committee for Adoption.

Sincerely,

David R. Richards
Executive Assistant

DRR/lm
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Enc.